82-1572

IN THE

Supreme Court of the United States

October Term, 1981

BLAINE NEELY, *Petitioner,*

vs.

COMMONWEALTH OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA (PENNSYLVANIA SUPREME COURT NO. 566 E.D. MISC. DOCKET 1981: PHILADELPHIA COMMON PLEAS COURT INFORMATIONS 1482-1484, APRIL TERM, 1977).

PETITION FOR CERTIORARI

DANIEL M. PREMINGER, ESQUIRE
Attorney for Petitioner
Suite 1050—Robinson Building
42 South 15th Street
Philadelphia, Pennsylvania 19102
(215) 564-1227

Batavia Times Publishing Co.
Philadelphia, Pa. (215) 568-7783

I. Question Presented

Was not petitioner's Sixth Amendment right to counsel violated when, after a March 1977 arrest in Philadelphia, Pennsylvania for Possession With Intent to Deliver a Controlled Substance (Heroin) and while incarcerated in California awaiting extradition for trial on this offense, he summoned an alleged friend to visit him, unaware that the alleged friend was a federal undercover agent with the Drug Enforcement Administration who had spoken with the Philadelphia Narcotics Police and learned of petitioner's case, and who initiated a discussion of heroin with petitioner and then testified to the remarks made by petitioner at petitioner's trial before a Philadelphia jury?

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IV. Opinions in Court Below

On January 16, 1980, the Honorable Stanley Kubacki, Philadelphia Common Pleas Court Judge, denied petitioner's motion to suppress statements allegedly made by petitioner to a federal undercover agent while petitioner was incarcerated in the Los Angeles County Jail. Judge Kubacki's opinion is attached hereto as Appendix "A".

On January 18, 1980, a jury found petitioner guilty on Bill No. 1482 of April Sessions, 1977 (Knowing and Intentional Possession of a Controlled Substance; Manufacture, Deliver or Possession With Intent to Deliver a Controlled Substance), Bill No. 1483 of April Sessions, 1977 (Possession of Instruments of Crime), and Bill No. 1484 of April Sessions, 1977 (Criminal Conspiracy). On May 9, 1980, Judge Kubacki denied petitioner's motion for post verdict relief and sentenced petitioner to not less than seven and one half (7½) nor more than fifteen (15) years on Bill No. 1482, not less than two and one half (2½) nor more than five (5) years on Bill No. 1483 consecutive with Bill No. 1482, and not less than two and one half (2½) nor more than five (5) years on Bill No. 1484 concurrent with Bill No. 1483. His opinion denying post verdict relief is attached as Appendix "B".

Pursuant to an appeal filed by petitioner, on October 2, 1981, a panel of the Superior Court of Pennsylvania, in a memorandum opinion, affirmed petitioner's conviction. The opinion of the Superior Court is attached as Appendix "C".

A petition for allowance of appeal from the Superior Court's judgment was denied by the Pennsylvania Supreme Court on January 11, 1982, by a *per curiam* order attached hereto as Appendix "D".

V. Jurisdictional Statement

Jurisdiction is conferred by 28 U.S.C. §1257(3). Petitioner's timely petition for a direct allowance of appeal to the highest state court in Pennsylvania, the Pennsylvania Supreme Court, from the judgment of the Superior Court, was denied in this criminal case by the Pennsylvania Supreme Court on January 11, 1982. This petition for writ of certiorari is timely filed since it was mailed within sixty (60) days of January 11, 1982. Rule 20.1.

VI. Constitutional Provisions

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII. Statement of the Case

Petitioner was arrested on March 18, 1977 and charged with Manufacture, Delivery or Possession With Intent to Deliver a Controlled Substance and associated offenses for heroin seized at a Holiday Inn, 36th and Chestnut Streets, Philadelphia, Pennsylvania. On July 14, 1977 the Honorable William M. Marutani denied a motion to suppress physical evidence. On March 13, 1978 a bench warrant was issued for petitioner's arrest, and in July 1979 petitioner was arrested in Los Angeles County, California. On January 3, 1980 the Honorable Stanley Kubacki denied a motion to suppress statements allegedly made by petitioner to a federal undercover agent while petitioner was in the Los Angeles County Jail. On January 18, 1980 petitioner was found guilty by a jury. On May 9, 1980 post verdict motions were denied and petitioner was sentenced to not less than seven and one half (7½) nor more than fifteen (15) years on bill 1482 (Manufacture, Delivery or Possession with Intent to Deliver a Controlled Substance) a consecutive not less than two and one half (2½) nor more than five (5) years on bill 1483 (Possession of Instrument of Crime) and not less than two and one half (2½) nor more than five (5) years on bill 1484 (Criminal Conspiracy) concurrent with bill 1483.

Petitioner timely filed an appeal to the Superior Court, which affirmed the Judgment of Sentence of the lower court. Petitioner seeks to appeal the decision of the Superior Court.

At the January 3, 1980 motion to suppress, pursuant to a written motion and supporting memorandum of law (see Appendices "E" and "F"), Jeffrey Bordok, Special Agent with the U.S. Justice Department, Drug Enforcement Administration testified that in June, 1979 he was an undercover agent operating a chemical store in

Orange, California. Petitioner allegedly came to the store on June 11, 1979 to purchase chemicals allegedly used in the manufacture of methamphetamine (January 3, 1980, pg. 9, hereinafter M.S. 9). On June 14, 1979 petitioner visited the store and left a deposit for some propanone and methlyamine. These initial conversations did not involve the purchase or sale of any drug. On July 30, 1979 an individual allegedly sent by Mr. Neely went to the store and said that Mr. Neely was asking Mr. Bordok to visit him in the Los Angeles County Jail. Mr. Bordok made an initial check and found that Mr. Neely was arrested on an "out of state warrant from Philadelphia". Mr. Bordok contacted Detective Grove of the Philadelphia Police Department and was advised that the warrant concerned "a heroin offense in Philadelphia". Mr. Bordok visited Mr. Neely in the Los Angeles County Jail on August 1, 1979, and they discussed Mr. Neely's previous purchase at the store and Mr. Neely's desire to purchase more of the same. In addition, Mr. Bordok *first brought up the subject of heroin* when he said "*I also told him that I was interested in obtaining heroin and asked if he could supply heroin to me*".[1] On September 21, 1979 Mr. Bordok again visited the prison and a delivery of heroin and other subjects were discussed. On September 25, 1979 Mr. Bordok again went to see petitioner concerning final plans (on the heroin delivery). In the course of the discussion Mr. Neely allegedly told Mr. Bordok that "this particular source was the same source for the

[1] In its opinion the Superior Court twice stated that petitioner proposed the sale of heroin to Agent Bordok, and that this conversation was at petitioner's instance (See Appendix "C", pp. 27, 30). This is an incorrect recitation of the facts. See: Notes of Testimony from the Motion to Suppress, January 3, 1980, pp. 13, 35). Moreover, the section of trial testimony cited by the Superior Court neither contradicts the testimony of the Motion to suppress nor supports the Superior Court's assertions.

heroin that he had in his possession in Philadelphia, which was the reason he was in jail in Los Angeles at that time". During those visits, Bordok also discussed with Mr. Neely the question of Mr. Neely's bail and Mr. Neely's desire to change counsel.

At the trial level, petitioner was represented by Harry Seay, Esquire. Mr. Seay filed post verdict motions, and supplemented those motions with a memorandum of law which discussed the factual situation recited above and briefly the right to counsel issue in his opinion (See: Appendix "B", wherein Judge Kubacki mentions the right to counsel cases petitioner has cited both here and in the Superior Court).

VIII. Reasons Relied on for the Allowance of the Writ of Certiorari

The instant petition for a writ of certiorari should be granted because this presents important constitutional questions of first impression concerning the right to counsel as discussed by this Court in *Massiah v. United States*, 377 U.S. 201 (1964); *Brewer v. Williams*, 430 U.S. 395 (1977); and *United States v. Henry*, 100 S.Ct. 2183 (1980). This case is significant because it presents an opportunity for this Court to resolve the question of whether an accused, who had become acquainted with a federal undercover agent under false pretenses prior to his incarceration, has waived his right to counsel merely because he invited the agent to visit him at the prison.

In this case, Mr. Neely had been befriended by an undercover federal agent. When Mr. Neely was incarcerated, he sent a message to this agent to come to the prison to visit him. The agent contacted the local police to learn why Mr. Neely was incarcerated, and then contacted the Philadelphia narcotics squad and learned that Mr. Neely was wanted in connection with an arrest for heroin. Thereafter Mr. Bordok visited the prison and, during a visit with Mr. Neely, Mr. Bordok *initiated* a conversation about heroin. The evidence produced in this and other conversations was admitted at trial. This was a violation of Mr. Neely's right to counsel.

It is now well settled law that statements obtained from a criminal defendant after he has been indicted, and/or his right to counsel has attached, *Kirby v. Illinois*, 406 U.S. 682 (1972); *Brewer v. Williams, supra*, are inadmissible if they have been obtained in violation of his right to counsel, *Massiah v. United States, supra; Brewer v. Williams, supra; United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980); *People v. Lebell*, 152 Ca. Rptr. 840 (Cal. App. 1979).

The key questions to be asked are: what constitutes interrogation, and who is a police/or prosecutorial agent?

In *Massiah, supra,* a defendant in a narcotics case made incriminating statements to a co-defendant in the co-defendant's car, not knowing that the co-defendant had become a government agent and that the car was wired by the government with a listening device. The United States Supreme Court reversed the conviction, stating that there had been interference with Massiah's right to counsel. In *Brewer v. Williams, supra,* the deeply religious Williams, who had already been arrested and spoken with a lawyer—and who said he'd tell all after he saw his Des Moines lawyer—was being transported in a car by the police, one of whom spoke about the deceased's right to a Christian burial. Williams then directed the police to the victim's body. The United States Supreme Court found the circumstances constitutionally indistinguishable from *Massiah* and reversed the conviction, ruling that the "Christian burial speech" deliberately elicited incriminating statements from Williams in violation of his Sixth Amendment right to counsel.

In *Henry, supra,* a bank robbery defendant was incarcerated in the same prison as inmate Nichols, a paid government informant. Nichols was told by government agents to be alert for any statements, but not to initiate the conversation or question Henry concerning the robbery. While they were incarcerated together, Henry told Nichols a few facts about the bank robbery and the evidence against him. After his release, Nichols reported these conversations to the government agents. The *Henry* Court found a Sixth Amendment violation, and enunciated certain key factors to be used in determining whether or not a Sixth Amendment violation has occurred. These factors are present here. First, like the agent in *Henry,* here Bordok was a paid government agent.

Second, while the agent in *Henry* was a fellow inmate who did not initiate any conversation regarding the bank robbery, here Bordok was ostensibly a businessman who on his own-after gathering information from Philadelphia-purposely initiated the first conversation about heroin. Thus, like in *Henry*, Bordok here was not a passive listener (as the co-defendant was in *Massiah*), but instead deliberately used his position to elicit incriminating information (as in *Williams*). Third, like in *Henry*, petitioner was incarcerated and under indictment when the conversations in question occurred. Fourth, like in *Henry*, petitioner was unaware of Bordok's role as a government agent. Fifth, like *Henry*, incarceration is a relevant factor because "... confinement may bring into play subtle influences that will make [appellant] particularly susceptible to the ploys of undercover government agents" and raise powerful inducements to reach for aid, *Henry*, *supra*, at 2188. Here, as a result of Agent Bordok's undercover tactics, petitioner not only asked Bordok to help raise and/or put up the bail, but even discussed with Bordok the question of changing counsel. Here, like *Brewer v. Williams*, the circumstances are constitutionally indistinguishable from *Massiah* and *Henry*. (See also: *United States v. Sampol*, *supra*, concerning right to counsel and fellow inmate who became government informant.)

In *State v. Travis*, 360 A.2d 548 (R.I. 1976) an incarcerated defendant indicated his desire to consult an attorney. After that indication, he made statements to a police officer disguised as a cellmate. Despite the fact that no interrogation occurred, the Rhode Island Court found a right to counsel violation. Here petitioner actually discussed the selection of new counsel with agent Bordok and discussed, at Bordok's initiation, the heroin (case in Philadelphia) and its source.

In *People v. Lebell, supra*, the defendant telephoned his friend at home and related that he had committed a murder. His friend was a police officer. After a criminal complaint was filed, the officer was wired with a recording device. The officer then visited the defendant, who again admitted the murder. Lebell's conviction was reversed, the court ruling that once he was wired the officer stopped being a friend and began functioning as a prosecutorial agent deliberately eliciting inculpatory statements. Here, after Bordok was called to jail by petitioner, and contacted the Los Angeles and Philadelphia police, his visits and conversations with petitioner were a prosecutorial agent's actions designed to elicit incriminatory statements.

Thus under the decisions of the United States Supreme Court and other state courts, a cellmate who listens to, converses, and reports on-or a police officer who deliberately elicits-incriminating statements, is a police or prosecutorial agent who has engaged in interrogation. Where such an event occurs, a conviction should be reversed.

The fact that petitioner requested Bordok to visit him at the prison is totally irrelevant to the rationale underlying the above-cited right to counsel cases. As this Court pointed out in *Henry, supra*

> No doubt the role of the agent at the time of the conversations between Massiah and his co-defendant was more active than that of the federal agents here. Yet the additional fact in Massiah that the agent was monitoring the conversations is hardly determinative. In both Massiah and this case the informant was charged with the task of obtaining information from an accused. Whether Massiah's codefendant questioned Massiah about the crime or merely engaged in general conversation about it was a matter of no concern to the Massiah Court. *Moreover, we deem it irrelevant that in Massiah the*

> *agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused.* 100 S.Ct. at 2187, fn. 10. (emphasis added).

The right to counsel is indispensible to our system of justice, and a person is entitled to the help of a lawyer after the judicial proceedings have been initiated against him. Here, judicial proceedings had been initiated when petitioner was incarcerated in Los Angeles. By initiating a discussion about heroin with petitioner while he was incarcerated, Agent Bordok deliberately and designedly set out to elicit incriminatory information to be used at petitioner's trial. Finally, the frequency and subject matter of Bordok's conversations with petitioner demonstrates that Bordok had literally replaced petitioner's lawyer as advisor and counsellor. This Honorable Court should grant a New Trial to remedy this obvious Sixth Amendment violation.

Despite the obvious importance of this issue, the Superior Court has ruled that the issue was waived because trial counsel did not specifically raise the issue at post verdict motions and appellate counsel did not charge trial counsel with ineffective assistance for failure to preserve the issues. The Superior Court has here misperceived trial counsel's actions. Trial counsel did file "boiler plate" motions, but also filed supplemental papers clearly raising the right to counsel issue.[2] The issue was then discussed at the hearing on post verdict motions (May 9, 1980 Notes of Testimony p. 8) and dis-

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[2] Attached hereto as Appendix "F".

cussed in the Opinion issued by Judge Kubacki. Thus the matter was raised pre-trial and post trial, and properly discussed by the trial court.[3]

If this Honorable Court does not accept this matter for consideration, then the entire issue will be raised again via Post Conviction Hearing Act[4] procedures. Such procedures will delay consideration of an issue of paramount importance that has not previously been addressed by this Court. Rather than delay the matter, this Honorable Court should accept this case and utilize it to establish the parameters of the right to counsel.

Respectfully submitted,

DANIEL M. PREMINGER, ESQUIRE
Attorney for Petitioner,
Blaine Neely

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[3] The rationale underlying the principle of waiver is that failure to raise an issue in the lower court denies the lower court an opportunity to pass on the particular issue. Since, in the instant case, the trial court had full opportunity to consider the issue raised in the instant petition, the Superior Court's decision in regard to waiver was clearly erroneous.

[4] 19 P.S. §1180-1 *et seq.*

APPENDIX "A"

Opinion of Court of Common Pleas of Philadelphia County, Pennsylvania

* * *

[1.8] follow the instruction not to discuss it.

THE COURT: The general rule is that character witnesses and expert witnesses may remain in the courtroom throughout the trial. If that is all he is going to testify to—

MR. ABRAHAMSEN: That is all he is going to testify to. He has no factual knowledge.

THE COURT: He may remain in the courtroom.

(Recess held.)

(The following occurred in the courtroom, out of the presence of the jury panel and in the presence of the defendant:)

THE COURT: Gentlemen, with respect to the motion to suppress, the Court makes the following findings of fact: On June 11, 1979, Agent Bordok was posing as the owner of a chemical store in Orange, California. The store was [1.9] equipped to make secret video takes of the customers, including this defendant. While in this undercover capacity, he met the defendant who engaged him in conversation about the possible purchase of chemicals, which are the precursor of methamphetamine and amphetamine.

A few days later the defendant placed an order for these chemicals and the two next had contact in the Los Angeles jail on August 1, 1979, Agent Bordok learned of the defendant's presence in jail through the defendant's agent, a man named Chisholm.

Bordok went to the jail at the defendant's request as relayed through Chisholm. Before going to jail, Agent Bordok learned the defendant was a fugitive from this jurisdiction on a narcotics charge involving heroin.

On subsequent visits to the defendant [1.10] in jail, Agent Bordok and the defendant discussed the defendant's selling heroin to Agent Bordok as well as Bordok supplying the chemicals to make methamphetamine and amphetamine.

On September 26, 1979, defendant's agent Chisholm called Agent Bordok and relayed a request from the defendant that they meet in the jail. Agent Bordok complied. It was at this meeting, during a discussion of the defendant's proposed sale of a large amount of Mexican heroin in the Los Angeles area, the defendant stated that the source for this heroin was the same source for the heroin that he had in his possession in Philadelphia when he was arrested.

It is clear that the defendant initiated these contacts and these discussions. Agent Bordok did not initiate any discussions and did not seek to discuss the charges for which the defendant is now before the Court, [1.11] although Agent Bordok did know of the charges and did go to visit the defendant in prison to discuss securing heroin.

The Court therefore makes the following conclusions of law: Defendant's statement of the 26th of September was entirely voluntary. Defendant's statement was not the product of any interrogation and in fact was a self-serving, spontaneous declaration by him. The use of a

Government agent to secure this evidence was not violative of any of the defendant's constitutional rights as they pertain to the case at bar. The use of a videotape under these narrow circumstances does not violate any constitutional rights of the defendant.

The motion to suppress the statement of September 26, 1979 is hereby denied. The motion to suppress the videotape of the defendant in the chemical store is hereby denied.

* * *

APPENDIX "B"

Opinion of Court of Common Pleas of Philadelphia County, Pennsylvania

IN THE

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION—CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLANE NEELY.

April Term, 1977
No. 1482 to 1485

RECEIVED
12-4-80

OPINION

BY: JUDGE STANLEY L. KUBACKI
DATED: OCTOBER 23rd 1980

Defendant, Blane Neely, was convicted after a jury trial on January 14-18, 1980, of possession with intent to deliver a controlled substance, possessing instruments of crime, and conspiracy. Prior to trial motions to suppress evidence were argued and denied. A motion to suppress physical evidence and statements was filed and litigated before the Honorable William M. Marutani in July of

1977. That motion was filed and litigated on behalf of defendant and all of his co-defendants, James Ward, Earl Blossom, John Hawks, Lovell King, and Scippio Chisolm. Judge Marutani made findings of fact and conclusions of law and they are part of the record in this matter.

The co-defendants went to trial before the Honorable Samuel Smith. Several of the co-defendants perfected appeals to the Superior Court, each challenging Judge Marutani's rulings. In each case where an appeal has been taken, the judgment of sentence has been affirmed, per curiam. (See *Commonwealth v. James A. Ward,* Pa. Super., 395 A.2d 964 (1978); *Commonwealth v. Scippio Chisolm,* Pa. Super., 395 A.2d 964 (1978); *Commonwealth v. Lovell King,* Superior Court No. 979, October Term, 1978 filed 9/26/80). Defendant's case had been severed from his co-defendants cases prior to trial.

Defendant fled the jurisdiction prior to trial and was extradited from California to stand trial. Prior to trial, defendant litigated a motion to suppress a statement he had given to an undercover agent of the Drug Enforcement Agency while in custody in California. That motion was denied by this Court and findings of fact and conclusions of law were made a part of the record.

The facts at trial established that defendant, along with others, possessed approximately a half million dollars worth of heroin. Defendant and others were arrested in Room 1622 of the Holiday Inn at 36th and Chestnut Streets by Philadelphia police officers. The police officers acted on the basis of information received from an informant who had previously given information which had led to three arrests. Police officers acting on this tip set up a surveillance of the Holiday Inn at approximately 1:00 A. M. on March 17, 1977. Information was received from the night manager that, the room in

question was registered to a "Walter Mitchell", long distance calls were being placed to California, people were seen going in and out of the room, and the occupants had refused maid service for several days of their stay in the room. The police then set up surveillance in the hallway adjacent to Room 1622. The police attempted to secure a search warrant but were unable to do so because no judge was available at the Police Administration Building. While the police were debating their next move, a young lady, Tanya Brown, arrived at the Holiday Inn. She was met by one of the occupants of the room. The police had reason to believe she was a courier coming to pick up the heroin. Believing that they could no longer wait for a judge to issue a search warrant the police stopped the pair, identified themselves, and accompanied them to Room 1622. The police had the man who had met Tanya Brown in the lobby, Earl Blossom, knock on the door. When the door was answered the police identified themselves and proceeded into the room. A scuffle ensued, defendant reached for a revolver, as did a co-defendant. The police stopped the men before they could reach the weapons and seized the two hand guns, a loaded .38 calibre revolver and a loaded Smith and Wesson automatic pistol. The police found two cases in the room. One was open underneath a television stand in plain view. This attache case contained the bulk of the heroin and was seized by the police within a minute of their entry into the room. The case was later accidently locked and the police had to break the lock when they needed to reopen the case at their headquarters.

While the defendant was in California he met a Drug Enforcement Agency undercover agent named Bordok. On June 11, 1979 DEA Agent Bordok was posing as the

owner of a chemical store in Orange, California. The store was equipped to make secret video tapes of its customers including this defendant. While in this undercover capacity he met the defendant who engaged him in conversation about the possible purchase of chemicals which are the precursor ingredients of methamphetamine and amphetamine. A few days later the defendant placed an order for these chemicals and the two next had contact in the Los Angeles jail on August 1, 1979. Agent Bordok learned of the defendant's presence in jail through the defendant's agent, a man named Chisolm. Bordok went to the jail and at the defendant's request as relayed through Chisolm.

Before going to the jail Bordok learned that the defendant was a fugitive from Pennsylvania on a narcotics charge involving heroin. On subsequent visits to the defendant in jail Agent Bordok and the defendant discussed the defendant's selling heroin to Agent Bordok as well as Bordok's supplying the chemicals to make methamphetamine and amphetamine.

On September 26, 1979, defendant's agent Chisolm called Agent Bordok and relayed a request from the defendant that they meet in the jail. Agent Bordok complied. It was at this meeting, during a discussion of defendant's proposed sale of a large amount of Mexican heroin in the Los Angeles area that defendant stated that the source for this Mexican heroin was the same source for the heroin that he had in his possession in Philadelphia when he was arrested.

It is clear that the defendant initiated these contacts and these discussions. Agent Bordok did not initiate any discussions and did not seek to discuss the charges for

which the defendant was brought to trial before this Court, although Agent Bordok did know of the charges and did go to visit the defendant in prison to discuss securing heroin.

Defendant raises several points but none have merit. First, defendant challenges the denial, by Judge Marutani, of his motion to suppress physical evidence. Judge Marutani's excellent findings of fact and conclusions of law are a part of the record and are dispositive of this challenge. This Court can see no reason to overturn Judge Marutani's ruling.

Defendant challenges this Court's denial of his motion to suppress the statement given to Agent Bordok. This point is controlled by *Massiah v. United States*, 84 S. Ct. 1199, 377 U. S. 201 (1964) and its progency, most notably *Henry v. United States*, 100 S. Ct. 2183 (1980). The crucial tests are whether the agent had focused on the defendant and sought to get incriminating information to be used for a pending prosecution. The cases are not applicable when there has been no interrogation and do not govern police or prosecution conduct except where the authorities are seeking to get incriminating information from a defendant after he has been indicted or charged. In this case Agent Bordok had not focused on the particular crime for which defendant was on trial and did not set out to gain incriminating information about this case. There was no violation of defendant's rights.

Defendant challenges this Court's refusal to recuse itself but cites no reasons to support this challenge. Defendant alleges that the Commonwealth failed to produce the detective "49" report and that this violated the defendant's right to a fair trial. This contention is

baseless. The Commonwealth produced a copy of the "49" and defense counsel then stated, "my only objection is that it is a copy." (N.T. 2,3) The fact that the "49" produced was a copy of the original did not prejudice the defendant in any way. Counsel waived any other objections by his statement quoted above. Also, counsel failed to request the production of any statements or reports, he merely asked if the "49" was in existence. There having been no demand for "Jencks" material there can be no violation of defendant's rights for failure to comply. Finally, the Commonwealth did comply. It produced an exact copy of the "49".

The defendant cites as error the Commonwealth's failure to produce the Holiday Inn's night manager, or to make him available to the defense. This Court knows of no authority for this proposition and the defendant has cited none.

Defendant challenges this Court's having given a charge as to flight. The charge given was proper. There was ample proof of flight and no reason to caution the jury that the defendant may have been in California for perfectly innocent reasons. The Court's charge was proper. Similarly, there was no error committed despite the fact that the court clerk could not find a copy of the defendant's subpoena. The evidence of flight was overwhelming (N.T. pp. 2.49-2.57).

The defendant asserts that the Court improperly engaged in a "question and answer session" when the jury returned with a question. As defendant concedes, it is not error for the Court to give a jury additional instructions when they return with a question. That is all that took place here. There was no "question and answer session," nor did the Court solicit questions.

Appendix "B"—Opinion of Court of Common Pleas of Philadelphia County, Pennsylvania.

The defendant states that certain hearsay evidence was improperly admitted. He cites the Court's allowing testimony concerning a conversation of Tanya Brown's (N.T. 1.85-1.87) made to the arresting officers, and testimony by a police officer about the name of the person registered in Room 1622 which the officer obtained by making a copy of the hotel's registration book. As counsel admits hearsay is admissible when it is not offered for the truth of the matter and the record is clear on this point. Defendant's allegation is without foundation.

Defendant argues that it was error to allow Officer Willie Davis to testify as an expert. Officer Davis testified as an expert for the Commonwealth to establish the fact that the amount of heroin involved and its manner of packaging created an inference that the occupants were not merely possessing the heroin but had it with the intention of selling it. Officer Davis is an experienced police officer with substantial experience in narcotics. He was qualified to testify as an expert. The facts in this case are similar to *Commonwealth v. Wright*, 234 Pa. Super., 83 (1975) where the arresting officer testified, based on his experience, that the defendant, who was arrested with twenty-five bags of heroin, was not an addict. Officer Davis' expertise was firmly established and allowing him to testify as an expert was not error.

In conclusion, defendant's claims are without merit and the Judgment of sentence should be affirmed.

BY THE COURT:

KUBACKI,
J.

APPENDIX "C"

Opinion of the Superior Court of Pennsylvania

J. 1158/1981 IN THE

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLAINE NEELY,

Appellant.

No. 1258 Philadelphia 1980

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the above captioned matter, of the Court of Common Pleas of PHILADELPHIA County be, and is AFFIRMED.

BY THE COURT:
J. HANIEL HENRY
Prothonotary

Dated: 10/2/81

Appendix "C"—Opinion of the Superior Court of Pennsylvania.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLAINE NEELY,

Appellant.

No. 1258 Philadelphia 1980

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County at Nos. 1481/1484 April Term 1977.

Before: WICKERSHAM, McEWEN and WIEAND, *JJ.*

FILED
OCT 2 1981

PER CURIAM:

Judgment of sentence affirmed.

WIEAND, *J.* concurs in the result.

Appendix "C"—Opinion of the Superior Court of Pennsylvania.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLAINE NEELY,

Appellant.

No. 1258 Philadelphia 1980

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County at Nos. 1481/1484 April Term 1977.

Before: WICKERSHAM, McEWEN and WIEAND, *JJ.*

MEMORANDUM OPINION:

Based on an informant's tip and their independent surveillance, the Philadelphia Police raided a room registered to appellant at the Holiday Inn in Philadelphia at approximately two o'clock a.m. on March 18, 1977. As a result of the raid, appellant and several other men were arrested and a large quantity of heroin with a street value of $500,000, and two handguns were confiscated.

Trial was subsequently scheduled but when appellant failed to appear, a bench warrant was issued for his arrest.

Appellant had gone to California and, during the month of June, 1979, he made several visits to a chemical store in the City of Orange, California. The chemical store was operated by Jeffrey Bordok, who was a special agent with the U.S. Department of Justice, Drug Enforcement Administration working undercover. On July 30, 1979, Agent Bordok received information that appellant was in custody in the Los Angeles County Jail and that Neely wished to speak with him. Agent Bordok discovered that appellant had been arrested on a out-of-state warrant from Philadelphia, Pennsylvania and that the Pennsylvania warrant stemmed from charges involving heroin. Agent Bordok visited appellant on several occasions in the Los Angeles County Jail and during one of those visits appellant proposed a sale of heroin to him.

Q. Did you have a conversation with him at that time?

A. Yes.

Q. What was the conversation about?

A. During that conversation I met with Mr. Neely in the jail and also an individual who identified herself to me as his wife. And we discussed a transaction wherein he was going to sell me a quantity of heroin.

Q. Did he say anything about the quality of the heroin that he proposed to sell?

A. Not at the time of that meeting.

Q. Did he say anything about the source?

A. Not at the time of that meeting.

Q. Was there another meeting at which that was discussed?

A. Yes.

Q. When was that meeting?

A. That was on the 26th of September, 1979.

Q. And what was said with regard at that meeting to the quality of the heroin that was proposed to be delivered to you?

A. Mr. Neely stated that the heroin was of good quality and that it could be cut or diluted six times and that he was certain of the quality because he was getting the heroin from a source that he had obtained heroin from for a considerable period of time—it was this heroin from the same source that he was currently in jail because of him being in possession of that heroin in Philadelphia.

Q. During these meeting with Mr. Neely, was he aware that you were an DEA agent?

A. No, he was not.[1]

Appellant was returned to Pennsylvania for trial in late September 1979. Following a jury trial, appellant was convicted of possession with intent to deliver a controlled substance, possessing the instruments of a crime and criminal conspiracy. Post-verdict motions were denied and appellant was sentenced to a term of imprisonment totalling fifteen to thirty years and was fined $50,000. This appeal followed.

After sentencing, appellant retained new counsel for the purpose of advancing this appeal. Appellant's new appellate counsel raises several arguments in his ap-

[1] Trial transcript dated January 16, 1980 before the Honorable Stanley L. Kubacki, and a jury, Commonwealth v. Blaine Neely, at 1.146-1.147.

pellant brief, but we find that the only issues preserved for appeal are those alleging ineffectiveness of trial counsel.[2]

Appellant claims that trial counsel was ineffective for failing to object or request cautionary instructions to the introduction of alleged evidence of other criminal activity.

It is well settled that evidence of criminal activity not charged in the indictment or information on which an accused is being tried cannot be introduced at trial except in certain limited circumstances. *Commonwealth v.*

---

[2] Appellate counsel raises the following issues which do not involve ineffectiveness of trial counsel in his appellate brief:

> Did not the lower court err in admitting into evidence statements taken from Mr. Neely in violation of his Sixth Amendment right to counsel.
>
> Did not the lower court err in admitting evidence of other crimes by Mr. Neely.
>
> Did not the lower court err in charging the jury on the issue of flight.
>
> Was not the prosecutor guilty of misconduct in his summation to the jury.
>
> Did not the lower court improperly deny the motion to suppress physical evidence.

We may not reach those issues, however, because trial counsel failed to include them in his boiler plate post-verdict motions filed on January 24, 1980, Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975); Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979), and appellate counsel does not allege that trial counsel was ineffective for failing to file adequate post-verdict motions. Commonwealth v. Upshur, 488 Pa. 27, 410 A.2d 810 (1980).

Fuller, 479 Pa. 353, 388 A.2d 693 (1978).[3] The instant situation was created by the defendant, not the government agent. Bordok did not initiate any conversation relating to the pending Philadelphia charges. Neely was discussing with Bordok an entirely new heroin transaction, at the instance of Neely, and it was Neely who voluntarily advised Bordok, his potential buyer, that he could personally vouch for the quality of the drugs as he had used the same source for the aborted Philadelphia sale. The Commonwealth had a clear need and right to put Bordok's testimony in its case-in-chief in order to establish the defendant's admission that he was involved in possession with intent to deliver heroin in Philadelphia, as charged. *United States v. White*, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453, *rehearing denied*, 402 U.S. 990, 91 S.Ct. 1643, 29 L.Ed.2d 156 (1971).

We hold that Agent Bordok's testimony was properly admitted as part of the Commonwealth's case in chief and therefore, an objection thereto would have been properly overruled. *A fortiori*, trial counsel was not ineffective for failing to make a baseless objection. In *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977), our supreme court speaking through Justice Pomeroy said:

> In resolving this contention we are guided by the standard set forth in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 235 A.2d 349, 352 (1967):

[3] Trial counsel had asserted a pre-trial motion to suppress Agent Bordok's testimony on the basis that appellate's statements had been in violation of his Fifth and Sixth Amendment rights, but the lower court denied the motion. The lower court's refusal to suppress did not preclude the possibility of raising a successful objection at trial on the ground that Agent Bordok's testimony constituted evidence of prior criminal activity, however. Commonwealth v. Jensch, 274 Pa. Superior Ct. 266, 418 A.2d 399 (1980).

> '[C]ounsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had *some reasonable basis* designed to effectuate his client's interests.'

The initial factor which must be considered in applying this reasonable basis standard is whether the claim which post-trial counsel is charged with not pursuing had some reasonable basis. In *Maroney* we noted that 'a finding of ineffectiveness could never be made unless we concluded that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized.' *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. at 605 n. 8, 235 A.2d at 353. Because counsel does not forego an alternative which offers a substantially greater potential for success when he fails to assert a baseless claim, counsel cannot be found to have been ineffective for failing to make such assertion.

Id. 472 Pa. at 277-78, 372 A.2d at 695-96.[4]

Judgment of sentence affirmed.

WIEAND, *J.* concurs in the result.

---

[4] After thoroughly reviewing the argument contained in appellant's brief, the record and the applicable law, we find that appellant's remaining arguments concerning ineffectiveness of trial counsel are without merit. Those arguments are that trial counsel was ineffective for failing to object to the lower court's charge with regard to the evidence of flight and for failing to object to alleged prejudicial statements made by the district attorney during his summation.

APPENDIX "D"

Per Curiam Order of the Supreme Court of Pennsylvania

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

CARL RICE, ESQ.
PROTHONOTARY
CATHERINE E. LYDEN
DEPUTY PROTHONOTARY

456 CITY HALL
PHILADELPHIA, 19107
(215) 686-3581-84

January 14, 1982

RECEIVED
1-15-82

Daniel M. Preminger, Esq.
Suite 1050—Robinson Bldg.
42 S. 15th St.
Philadelphia, Pa. 19102

RE: Commonwealth v. Penna., v.
Blaine Neely, Petitioner
No. 566 E. D. Misc. Docket 1981

Dear Mr. Preminger:

This is to advise you that on January 11, 1982 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

CARL RICE
Carl Rice, Esq.
Prothonotary

CR: jap
cc: Robert Lawler, Esq.

APPENDIX "E"

Motion to Suppress

IN THE

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLAINE NEELY.

April Term, 1977
Nos. 1482 to 1485

MOTION TO SUPPRESS ANY ORAL OR INCULPATORY STATEMENT OR THE SUBSTANCE OF ANY ORAL CONFESSION OR ORAL INCULPATORY STATEMENT

TO THE HONORABLE, THE JUDGES OF
THE SAID COURT:

The petition of Blaine Neeley, by his attorney, Harry R. Seay, respectfully represents:

1. He was arrested on June 21, 1979 in Los Angeles, California as a fugitive from Philadelphia, Pennsylvania.

2. That after the defendant was arrested and prior to his extradition to Philadelphia, he was engaged in con-

versation by one Jeff Bordak, known to the defendant as Jeff Lewis, said individual being an undercover agent for the United States Drug Enforcement Administration.

3. The oral inculpatory statements extracted from the defendant were involuntary and against his will and were the result of coercive tactics by the agent for the Drug Enforcement Administration.

4. At no time prior to giving the statements was the defendant advised of his right under the Federal Constitution that his statements and that any evidence obtained based upon his statements could be used against him, nor did the agent warn the defendant that anything said by him could be used as evidence against him at any trial, wherein the defendant had been indicted or could be arrested and indicted.

5. Though the defendant was in custody, he was not advised of his right to counsel prior to having any conversation with Agent Bordak.

6. The defendant did not intelligently, knowingly and voluntarily waive his constitutional rights in regard to any conversations with Agent Bordak.

7. That the statements given Agent Bordak were incriminating and deliberately elicited from him after he had been indicted and in the absence of counsel.

8. In the totality of the circumstances, the free will of the defendant was overborne by the coercive and persistent tactics of Agent Bordak.

9. The statements obtained by Agent Bordak from the defendant under all the circumstances should not be admitted into evidence because they were obtained in derogation of the defendant's rights under the Federal Constitution.

WHEREFORE, the defendant prays that an Order be entered suppressing the use of any and all statements, both oral and written, to be suppressed and not used at any trial of the defendant on the above mentioned indictments.

AND, he will ever pray.

HARRY R. SEAY, ESQUIRE
Attorney for the Defendant

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } SS

HARRY R. SEAY, being duly sworn according to law, deposes and says that he is the Attorney for Defendant, Blaine Neeley in the foregoing Motion to Suppress any Oral or Inculpatory Statement and is authorized to take this affidavit and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

Further, deponent sayeth not.

HARRY R. SEAY (SEAL)

Sworn to and subscribed before me this 2d day of January, 1980.

ROBERT L. CRAWFORD
Notary Public, Phila., Phila. Co.
My Commission Expires Feb. 18, 1982

APPENDIX "F"

Memorandum of Law

IN THE

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

COMMONWEALTH OF PENNSYLVANIA,

vs.

BLANE NEELY.

April Sessions, 1977
Nos. 1481 to 1485

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

I. THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION PROHIBIT POLICE OFFICERS AND FEDERAL AGENTS FROM QUESTIONING INDICTED DEFENDANTS SO AS TO USE INCRIMINATING STATEMENTS AT A TRIAL ON THE INDICTED OFFENSE.

Massiah v. United States, 377 U.S. 201 (1964), the United States Supreme Court held that the use of incriminating statements by a person who had been indicted and in the absence of his attorney violated his right to counsel.

Massiah's Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which the government agents had deliberately

elicited from him after he had been indicted and in the absence of counsel. (In the instant case see Notes of Testimony pp. 21, 22, 34, 35, 37).

II. THE FIFTH AMENDMENT BARS THE USE OF INCRIMINATING STATEMENTS MADE BY A DEFENDANT TO A FEDERAL AGENT OR POLICE OFFICER DUR-CUSTODIAL INTERROGATION.

Miranda v. Arizona, 384 U.S. 436 (1966).

In *U.S. v. Hayles*, 471 F.2d 788 (5th Cir. 1973), cert. denied, 411 U.S. 969 (1973), the court held that the government "may not nullify the protection Miranda affords a defendant by using *trickery* to extract incriminating statements from him that otherwise could not be obtained without first giving him the required warnings." p. 791 (emphasis added).

See also, *Brewer v. Williams*, 97 S. Ct. 1232 (1977); *Mathis v. United States*, 391 U.S. 1 (1968).

III. STATE LAW REGARDING ELECTRONIC SURVEILLANCE.

In the year of 1977 there was no Pennsylvania Statute authorizing the use of wiretap evidence or electronic surveillance in a criminal prosecution, therefore, any evidence of this type, specifically, videotape is inadmissible in a state trial when secured by a federal agent, acting under color of federal law or statute.

Respectfully Submitted:

HARRY R. SEAY, Esquire
Attorney for the Defendant